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No. 93-1081

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

LEONARD GILLIS, VALDO SARGENI,
for Themselves and All Others Similarly Situated,
Petitioners,

v.

HOECHST CELANESE CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF OF PETITIONERS

KENT CPREK
Counsel of Record
SAGOT, JENNINGS & SIGMOND
1172 Public Ledger Building
Philadelphia, PA 19106
(215) 351-0615

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REPLY BRIEF OF PETITIONERS

I. THE CONFLICT IN THE CIRCUITS IS GROWING EXPONENTIALLY

The Courts of Appeals continue to flounder in a sea of inconsistency about the role of disclosure. The Fourth Circuit has withdrawn its troublesome conclusion that no communication other than a formal written document can create ERISA rights for a rehearing *en banc* on the issue posed for certiorari in this case, *Elmore v. Cone Mills Corp.*, 6 F.3d 1028 (4th Cir. 1993). In *Aiken v. Policy Mgmt Systems Corp.*, 13 F.3d 138, 17 (B.N.A.) Employee Benefits Cases 2079 (4th Cir., No. 92-2257, 1993), the Fourth Circuit joined the circuits which enforce a distributed plan description over an undisclosed plan.

The Seventh Circuit adopted contract principles as the basis for an ERISA Plan in *Meredith v. Allsteel, Inc.*, 11 F.3d 1354, 1357-1358 (7th Cir. 1993). In *Schoonejongen v. Curtiss-Wright Corp.*, —— F.3d ——, 17 (B.N.A.) Employee Benefits Cases 2041, 2046-2047, 62 U.S.L.W. 2468, 1993 WL 533734 (3d Cir. 1993), the Third Circuit held that a plan without an amendment procedure cannot be changed—rejecting its own implicit allowance of an amendment of the Merger Agreement in this case.

The Ninth Circuit has headed in exactly the opposite direction despite its prior decision in *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984). In *Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517, 17 (B.N.A.) Employee Benefits Cases 1990 (9th Cir. Nos. 91-36195, 91-36233, 1993), the Court concluded that promised benefits in excess of an undisclosed formal document could not be awarded to employees. In *Thesenvitz v. Kaiser Engineers Hanford Co.*, —— F.3d ——, 1994 WL 35528 (9th Cir., No. 92-36592, 1994), the employees were, as here, explicitly denied access to plan documents and retired in reliance on written representations as to their monthly pension amounts by the employer and plan. The company subsequently reduced those payments by 50%-67% per month based on the undisclosed plan documents. The Ninth Circuit incredibly denied the employees both the promised benefits and relief from their retirement decisions. The Ninth Circuit decisions reflect the same fundamental error as in this case by confusing the ministerial writing requirement of 29 U.S.C. § 1102(a)(1) with the definition of a "plan" under 29 U.S.C. § 1002(1), (2). The Hanford plan was never integrated through disclosure. Its unintegrated "plan," based on explicit disclosures to employees of promised benefits, may be enforced directly under 29 U.S.C. § 1132(a)(1)(B).

II. THE SUMMARY JUDGMENT IN FAVOR OF HOECHST RESTS ENTIRELY ON THE UNDISCLOSED AND UNAUTHENTICATED "1989" PLAN

Hoechst begs the entire issue of disclosure and puts the cart before the horse by assuming that a formal "writing" is a precondition to a "plan." Its brief in opposition focuses on a purported exclusion for sales in other documents. The claim ignores the lack of a writing requirement in the definition of a "plan" and the critical importance of judicial deference to Hoechst's "interpretation" of the "plan" in granting summary judgment.

The Third Circuit emphasized that the undisclosed "1989" document was critical in two respects. It was substantively important in its sales exclusion, Petition, pp. 8a, 5a and the absence of benefits for reductions in pay and voluntary terminations covered by the Merger Agreement, *see infra*. It was procedurally critical in allowing the Court to limit review to an "arbitrary or capricious" standard and thus avoid triable issues of fact concerning the terms of an unintegrated plan or ambiguities in documents subject to *de novo* interpretation by a court, Petition, pp. 5a-6a. Hoechst Celanese loses its summary judgment on severance pay without both of these critical after-the-fact additions through the phony "1989" policy.

A. The "Plan"

The only information disseminated to employees by Hoechst Celanese suggested that their benefits would be the same as pre-merger Celanese benefits. The pre-merger Celanese separation pay policy had no sales exclusion. Delaware City employees knew this from a pre-merger sale of Celanese facilities in Greer, South Carolina to their division of American Hoechst. The publicly filed original version of the Merger Agreement between American Hoechst and Celanese similarly lacked any sales lan-

guage and confirmed that such a plan and practice existed.[1]

The other documents disseminated by Hoechst promised fair treatment—leaving employees with the impression that they would receive the same benefits as they had seen elsewhere in the wake of the merger (and heard about, after the fact, for selected Delaware City employees). Absent "integration" through disclosure of different terms to employees, a trial court or jury rationally could find that the unintegrated plan followed prior Celanese practice—with no sales exclusion.

B. The Merger Agreement—Without Deference

The loss of an "arbitrary or capricious" standard dooms the summary judgment in favor of Hoechst in looking at other documents. The Merger Agreement had no provision to limit judicial review. Neither does any prior American Hoechst policy or other document.

The only publicly available severance pay document was the "tin parachute" clause in the Merger Agreement. The version originally filed with the SEC had no sales exclusion. An amendment revised the severance clause to include the sales exclusion of a prior American Hoechst policy and read as follows:

> (h) *Salary Continuation; Separation Pay; Other Benefit Plans.* Notwithstanding the terms of and in lieu of payment from the Company's salary continuation or written separation pay policy, for each employee of the Company, the Surviving Corporation or either of their subsidiaries . . . whose employment is hereafter terminated by Buyer, the Company (at the direction of Buyer, directly or indirectly), the Surviving

---

[1] Hoechst Celanese has not been able to locate a prior Celanese Corporation severance pay document. It was within the domain of Mr. Silversten, a former Celanese employee, who directed the Mirrex sale in-house. He now directs the corporate litigation response.

Corporation or its subsidiaries for any reason (other than for cause, death, disability, mandatory retirement or sale of all or part of a business, whether at one or more plant locations, where the acquiring company offers the affected employees continued employment and those employees accept such continued employment, and other than the previously announced shutdown of the Company's Greenville, South Carolina plant and the previously announced capacity reduction at the Company's Salisbury, North Carolina plant) at any time prior to January 1, 1989 or the second anniversary of the Effective Time, whichever is later (the "Termination Period"), or who elects to terminate his employment prior to the expiration of the Termination Period by reason of a reduction in his base salary, Buyer will provide, or will cause the Company or Surviving Corporation to provide, (i) for each such employee who is eligible to receive EIC for 1986 (approximately 175 people), . . .

* * * *

and (ii) for all such other employees, separation pay, payable in a single sum within ten business days following such termination, equal to two weeks' base salary for each full or partial year of service with the Company and Surviving Corporation plus an additional two weeks' base salary.

* * * *

An employee who is not entitled to the above described salary continuation payments or separation pay by reason of the fact that his employment was terminated as a result of a sale of a business and he accepted continued employment with the acquiring company shall nevertheless become entitled to such salary continuation payments or separation pay in the event that his employment is terminated (other than for cause, death, disability or mandatory retirement) by the acquiring company within one year of the commencement of such employment. The amount of such salary continuation payments or separation pay

> shall be reduced by the amount, if any, of any separation pay received by the employee from the acquiring company.

The changes simply added a sales exclusion without thought for its interplay with the provisions allowing severance pay on a "direct or indirect" reduction in pay, voluntary retirement or a simple quit or refusal to accept work with a buyer. The Merger Agreement is, at best, ambiguous as a result on sales.

The grafted plan is rationally read to deny severance pay only on a sale which continues the same pay structure. Applying a fresh look without deference, the Court in *Shawyer v. R.H. Macy & Co., Inc.*, 697 F.Supp. 1515, 1525-1526 (W.D. Mo. 1988) so construed a plan with similar ambiguities. See also, *Meredith v. Allsteel, Inc.*, 11 F.3d at 1357-1358 (plan is a contract which is construed against the draftor). Affidavits established that Hoechst paid double severance to employees who never lost a day of work. The provisions for lump sum payments on voluntary retirement or a reduction in pay plainly contemplate a severance plan providing compensation for loyal past service or liquidated damages for lost expectations in moving to a smaller and less stable company, *Barnett v. Petro-Tex Chemical Corp.*, 893 F.2d 800, 809 (5th Cir. 1990); *Bennett v. Gill & Duffus Chemicals, Inc.*, 699 F.Supp. 454, 459 (S.D.N.Y. 1988). The concept of an "indirect" termination by a reduction in pay under the Merger Agreement is meaningless without an interpretive gloss to limit the sales exclusion to comparable buyers and pay structures.

In this case, the employees lost basic pay through an immediate reduction in vacation pay. Cf. *Massachusetts v. Morash*, 490 U.S. 107, 115-118, 109 S.Ct. 1668 (1989) (vacation excluded from ERISA as wages). This reduction in pay and additional loss of benefits obviously was pre-planned by Hoechst Celanese and Mirrex in order to pay the leveraged buyout debt financed by Hoechst.

Hoechst agreed to deliver the employees to Mirrex as a group in order to convey a going business. It avoided disclosure in order to keep employees from exercising their option to retire or resign in order to receive severance pay under the Merger Agreement in order to facilitate its deal.[2] Hoechst affirmatively lied to the employees (after the sales announcement fixed liability under the Merger Agreement) in telling them that there was no severance pay plan even if the employees declined work with Mirrex. Without disclosure of written documents, the employees could not gamble their families on unknown benefits nor explain the discrepancy between Hoechst's statements in Delaware and its contrary and contemporaneous actions elsewhere.

In his deposition, Mr. Silversten, the in-house labor attorney and witness for Hoechst, admitted that coverage under the Merger Agreement was based on the date of the announcement—not actual payroll termination:

> Q. Did Celanese have a facility in Salisbury, North Carolina?
>
> A. Yes.
>
> * * * *
>
> Q. What happened, if anything, to it?
>
> A. Well, we still have it. So, it was neither sold, nor shut down. There were cutbacks at that plant, business reorganizations, and restructuring that resulted in a certain number of people losing their jobs, but we did not either sell or close the plant.
>
> Q. Was separation pay paid to those people—those salaried employees who lost their jobs?
>
> A. I believe so.

---

[2] Two employees with prior merger and sales experience at Union Carbide did elect to retire before the sale simply to lock in their known pension and retiree medical benefits at Hoechst. They received severance pay even though they were subsequently hired by Mirrex. Mr. Sargeni was in a position to do the same had the Merger Agreement been disclosed.

Q. How much?

A. One week for each year of service with the corporation, plus one additional week. Ten years of service, you get 11 weeks.

Q. Was that the prior Celanese plan?

A. Yes, it was. Let me clarify that, to give you the full picture and not mislead anybody. The announcement on the cutbacks took place at about the same time as the merger agreement. So, a question arose as to whether the separation pay provisions of the merger agreement, which gave two weeks for each year of service, plus two, double severance, as we called it, would apply. The decision was made, I believe correctly, that for the terminations that had been announced prior to the merger, that that had nothing to do with the merger, and those people would get the normal severance, but that the other terminations that were not announced and did not take place until the two-year period between February '87 and February '89, were covered by the merger agreement, and that those people got, using this term again, double severance of two weeks for each year of service, plus two weeks. So, there was some Salisbury people who got one plus one, and there were some Salisbury people who got two plus two. I want to make sure you get the full picture.

An affidavit from a former South Carolina employee separated from payroll after February, 1989 who received "double severance" confirmed that the critical event was the announcement--not the actual date of payroll separation. The sale of Delaware City was announced in January, 1989 before the stated expiration of the Merger Agreement.

Mr. Silversten also testified that the Merger Agreement was applied to another sale to a less stable venture capital firm.

Q. Did Celanese—excuse me.

Did Hoechst Celanese sell any facility in that period from 1987 to 1989?

A. I'm trying to get the time frame straight in my mind. Celanese was obligated—excuse me, Hoechst Celanese was required by the FTC, as part of their approval process, on the merger, to sell two plants, one in Fayetteville, North Carolina, and one in Florence, South Carolina.

Q. Was separation pay paid to salaried employees in those instances?

A. I'm trying to remember. I believe that it was.

Q. Who were they sold to?

A. It was sold to a company that took the name Fiber Industries, Inc. I don't recall the name of the —it was a merger capital group who bought it and then formed Fiber Industries, Inc. or FII.

Q. Did Fiber Industries offer continuing employment to salaried employees?

A. To most employees. . . .

Mr. Silversten likewise admitted application of the Merger Agreement provisions to American Hoechst employees. This was consistent with the definition of "Surviving Corporation" (as used in the Merger Agreement and its severance clause) to refer to the corporation resulting from the merger of Celanese Corporation and American Hoechst Corporation. An affidavit of a former American Hoechst employee in South Carolina confirmed the payment of "double severance" to former American Hoechst employees who left the payroll well after February, 1989.

The Third Circuit decided to relieve Hoechst Celanese from what it apparently perceived as an unwise bargain. Its actions violated basic principles of summary judgment and contract. American Hoechst and Celanese negotiated double severance for employees. They promised fair treatment to their employees to induce loyal and productive work in the downsizing and integration following the merger. There is no justice or law in discriminatorily and arbitrarily denying these benefits to the employees in this case. They must finance their own retiree medical costs in the wake of reduced employment at Mirrex and have

lost pay, benefits and expectations in the trauma of the sale after long years of service. Our law and economy rest on the sanctity of contracts and preclude post-hoc judicial modification of an arm's-length deal.

CONCLUSION

The Court should reaffirm the basic rules of summary judgment and contracts by granting the petition for a writ of certiorari.

Respectfully submitted,

KENT CPREK
Counsel of Record
SAGOT, JENNINGS & SIGMOND
1172 Public Ledger Building
Philadelphia, PA 19106
(215) 351-0615

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